

SENATE RECORD VOTE ANALYSIS

104th Congress
1st Session

Vote No. 238

June 7, 1995, 5:12 p.m.
Page S-7849 Temp. Record

TERRORISM PREVENTION/Ex Parte Investigation Requests

SUBJECT: Comprehensive Terrorism Prevention Act of 1995 . . . S. 735. Hatch motion to table the Biden amendment No. 1253 to the Hatch substitute amendment No. 1199.

ACTION: MOTION TO TABLE AGREED TO, 65-34

SYNOPSIS: As reported, S. 735 will enact law enforcement provisions to prevent terrorism and to apprehend and punish terrorists, and will reform Federal and State capital and noncapital habeas corpus procedures.

The Hatch substitute amendment to S. 735 would make major revisions to the bill, particularly to the provisions regarding international terrorism, alien removal, and fundraising by terrorist organizations.

The Biden amendment would strike section 608 from the Hatch amendment. That section would provide that no ex parte proceeding, communication, or request from a defense attorney for State government payment for investigative, expert, or other services in connection with a habeas petition of a capital conviction would be considered by a Federal judge without a proper showing of the need for confidentiality. (An "ex parte" court proceeding is one in which legal representation for only one side is present. "Habeas corpus" in the context of this debate refers to the collateral (not on the merits) review of criminal convictions. State and Federal prisoners may file habeas corpus petitions alleging that constitutional, legal, or treaty requirements were violated in the process of convicting them. State prisoners may file petitions in State or Federal courts; Federal prisoners may file petitions only in Federal courts; District of Columbia prisoners may file petitions only in non-Federal, District courts. The right of a State prisoner to file a habeas petition in Federal court is a right that was granted by statute.)

During debate, Senator Hatch moved to table the Biden amendment. The motion to table is not debatable; however, some debate preceded the making of the motion. Generally, those favoring the motion to table opposed the amendment; those opposing the motion to table favored the amendment.

Those favoring the motion to table contended:

(See other side)

YEAS (65)			NAYS (34)			NOT VOTING (1)	
Republicans (53 or 98%)		Democrats (12 or 27%)	Republicans (1 or 2%)	Democrats (33 or 73%)		Republicans (0)	Democrats (1)
Abraham	Helms	Baucus	Packwood	Akaka	Kennedy		Conrad ²
Ashcroft	Hutchison	Bryan		Biden	Kerrey		
Bennett	Inhofe	Byrd		Bingaman	Kerry		
Bond	Jeffords	Exon		Boxer	Kohl		
Brown	Kassebaum	Feinstein		Bradley	Lautenberg		
Burns	Kempthorne	Ford		Breaux	Leahy		
Campbell	Kyl	Graham		Bumpers	Levin		
Chafee	Lott	Johnston		Daschle	Lieberman		
Coats	Lugar	Nunn		Dodd	Mikulski		
Cochran	Mack	Reid		Dorgan	Moseley-Braun		
Cohen	McCain	Robb		Feingold	Moynihan		
Coverdell	McConnell	Rockefeller		Glenn	Murray		
Craig	Murkowski			Harkin	Pell		
D'Amato	Nickles			Heflin	Pryor		
DeWine	Pressler			Hollings	Sarbanes		
Dole	Roth			Inouye	Simon		
Domenici	Santorum				Wellstone		
Faircloth	Shelby						
Frist	Simpson						
Gorton	Smith						
Gramm	Snowe						
Grams	Specter						
Grassley	Stevens						
Gregg	Thomas						
Hatch	Thompson						
Hatfield	Thurmond						
	Warner						

EXPLANATION OF ABSENCE:

1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:

AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Ex parte proceedings in the post-conviction stage of a case have no justification. By the time a capital prisoner starts filing Federal habeas corpus petitions, he has typically already been tried and convicted, had a separate proceeding on the death penalty, gone through State appeals, and filed a direct Federal appeal. The facts in a capital case have been exhaustively investigated and brought out in trial by the time that Federal collateral petitions are filed. No need for secrecy involving new investigations is needed, because everything, including collateral claims, has already been thoroughly aired and upheld in court. However, such ex parte proceedings are common. Court-appointed defense lawyers frequently use them to introduce one more delay in the execution of their clients. They use the opportunity to appear before a Federal judge without a prosecutor present to argue their cases. They rehash old arguments, asking for State funding and time to pursue matters that they say are in need of further review. Adding insult, and even more cost, to injury, defense lawyers often incur expenses before appearing before Federal judges, and then ask for retroactive, "nunc pro tunc" payments. Liberal Federal judges who are ideologically opposed to the death penalty are easily swayed by defense arguments that one more witness needs to be questioned, or one more psychiatrist needs to examine the mental stability of a killer, or one more medical examiner needs to be asked his opinion. If prosecutors are allowed in the room when defense attorneys plead for yet one more expensive delay in the death penalty, they may prevent a one-sided presentation of the facts that will unduly sway a judge predisposed to approve of delays. Allowing prosecutors to be present will make certain that everything remains above board--the justification for a Federal judge to order a State to spend more money on yet one more investigation, and to delay an execution yet again, will have to be on the record. The Biden amendment would strike this needed reform. We consequently strongly support the motion to table the Biden amendment.

Those opposing the motion to table contended:

The Biden amendment is about fairness to indigent prisoners who are sentenced to death. If a wealthy person who has been sentenced to death pays for an investigation to find new evidence, that person does not have to inform the prosecution. Similarly, a prosecutor, who is paid by the State, does not have to reveal to defense lawyers his avenues of investigation. However, under this bill, a lawyer representing a poor person will not be able to ask the court for payment to pursue investigations to defend his client unless the prosecutor is there to hear his request. The defense counsel, in other words, will have to tip his hand as to the defense strategies he is pursuing. For example, he may request funds to investigate a police officer's background in order to find out if he has a history of racism that may have tainted his testimony. These types of inquiries, when conducted by prosecutors or defense lawyers who do not represent indigent clients, are conducted without informing the other side. It is unfair to make indigent clients abide by a different standard. The Hatch amendment will only allow ex parte proceedings if "a proper showing" of the need for confidentiality is made. This standard will create a Catch 22. Explaining the need for confidentiality in front of the prosecutor will itself reveal confidential information. For all practical purposes, this bill will not allow indigent capital defendants pursuing habeas petitions any right to formulate their court strategies in private. The Biden amendment would strike this unfair provision, and thus deserves our support.